FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 72

PAUL JOHN CARBO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1960
CERTIORARI GRANTED MAY 31, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 72

PAUL JOHN CARBO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from the U.S.D.C. for the Southern District of California		
Indictment	2	1
Proceedings on arraignment and plea of December 2, 1959	18	10
Proceedings on arraignment and plea of December 8, 1959	19	11
Motion to quash writ of habeas corpus ad prosequendum	20	12
Affidavit of William B. Beirne	21	12
Opposition to motion to quash writ of habeas corpus ad prosequendum	24	14
Application and order for writ of habeas corpus ad prosequendum	28	15
Order and judgment denying motion to quash	29	16
Notice of appeal	30	17
Stipulation re record on appeal	32	18
Writ of habeas corpus ad prosequendum	33a	19
Reporter's partial transcript of proceedings of March 16, 1960	35	20
Appearances	35	20
Ruling on motion to quash writ of habeas corpus	36	20

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 22, 1960

	Original	Print
Proceedings in the U.S.C.A. for the Ninth Circuit	40	22
Order of submission	40	22
Minute entry of order directing filing of opinion and filing and recording of judgment	41	22
Order re submission	42	23
Opinion, per curiam	43	24
Judgment	49	30
Clerk's certificate (omitted in printing)	50	30
Supplemental record in U.S.C.A. for the Ninth Circuit	51	31
Notice of motion to dismiss appeal	51	31
Motion to dismiss appeal	52	31
Affidavit of Lloyd D. Dunn	55	34
Notice of motion for stay pending appeal	58	35
Affidavit of William B. Beirne	59	36
Attachment—Letter from Dr. J. A. Hummel to "To Whom It May Concern," dated March 11, 1960	60	37
Notice of motion for leave to file petition for writ of mandamus and petition for writ of mandamus	62	39
Notice of motion for stay	66	41
Telegraphic motion for stay	67	42
Order denying motion for stay and directing immediate issuance of mandate	68	43
Clerk's certificate (omitted in printing)	69	43
Order allowing certiorari	70	44

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 27973 CD

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, aka John Paul Carbo, Frankie Carbo; FRANK PALERMO, aka Blinky Palermo; JOSEPH SICA; LOUIS TOM DRAGNA; TRUMAN GIBSON, JR., Defendants.

INDICTMENT—Filed September 22, 1959

(U.S.C., Title 18, Sections:

1951—Conspiracy to Violate Anti-Racketeering Act;
875(b)—Interstate Communications-Extortion;
371—Conspiracy)

The grand jury charges:

Count One

(U.S.C., Title 18, Sec. 1951)

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo, aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully to obstruct, delay and affect interstate commerce by means of extortion, in violation of United States Code Title 18, Section 1951.

3. The objects of such conspiracy were to be accom-
[fol. 3] plished as follows:

a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth [fol. 4] and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County,

California, within the Central Division of the Southern District of California, and in other places, as follows:

a. On or about October 23, 1958, defendant Frank Palermo had a conversation by telephone with Leonard Blakely.

b. On or about October 24, 1958, defendant Truman Gibson, Jr., had a conversation with Leonard Blakely, Donald Paul Nesseth and Jackie McCoy.

c. On or about December 30, 1958, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

d. On or about January 5, 1959, defendant Frank Palermo had a conversation with Leonard Blakely.

e. On or about January 5, 1959, defendant Paul John Carbo had a conversation with Leonard Blakely.

f. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

g. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

h. On or about April 22, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

i. On or about April 25, 1959, defendant Frank Palermo had a conversation with Donald Paul Nesseth in St. Louis, Missouri.

j. On or about April 25, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

k. On or about April 25, 1959, defendant Frank Palermo had a conversation with Sam Muchnick in St. Louis, Missouri.

l. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

[fol. 5] m. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

n. On or about May 3, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

o. On or about May 4, 1959, defendant Joseph Sica had a telephone conversation with Leonard Blakely.

p. On or about May 5, 1959, defendants Frank Palermo and Louis Tom Dragna visited the Hollywood American Legion Stadium where Donald Paul Nesseth and Leonard Blakely were present.

q. On or about May 6, 1959, defendants Joseph Sica and Frank Palermo had a conversation with Leonard Blakely, Donald Paul Nesseth and Jackie McCoy.

r. On or about May 6, 1959, Joseph Sica had a telephone conversation with Manuel Dros.

s. On or about May 7, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

t. On or about May 11, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

u. On or about May 14, 1959, co-conspirator William Daly had a conversation with Leonard Blakely.

[fol. 6]

Count Two

(U.S.C., Title 18, Sec. 1951)

1. On or about January 27, 1959, at Los Angeles, State of California, in the Central Division of the Southern District of California and within the jurisdiction of this court, Frank Palermo, a defendant herein, did knowingly, will-

fully and feloniously obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, by extortion (as defined in the said Section of the United States Code), that is to say, defendant Frank Palermo did obtain property to the value of $1,725.00 in the form of a personal check from Leonard Blakely, by the wrongful use of force and fear, in that said defendant did threaten Leonard Blakely with physical injury and violence unless Leonard Blakely paid defendant Frank Palermo the said sum.

2. Contrary to the terms and provisions of Section 1951 of Title 18, United States Code.

[fol. 7]

Count Three

(U.S.C., Title 18, Sec. 1951)

1. On or about January 27, 1959, at Los Angeles, State of California, in the Central Division of the Southern District of California and within the jurisdiction of this court, Paul John Carbo, a defendant herein, did knowingly, willfully and feloniously obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and did attempt to do so by extortion (as defined in the said Section of the United States Code), that is to say, defendant Paul John Carbo attempted to obtain property to the value of $1,725.00 in the form of money from Leonard Blakely, by the wrongful use of force and fear, in that said defendant did threaten Leonard Blakely with physical injury and violence unless Leonard Blakely paid defendant Frank Palermo the said amount of money.

2. Contrary to the terms and provisions of Section 1951 of Title 18, United States Code.

[fol. 8]

Count Four

(U.S.C., Title 18, Sec. 1951)

1. On or about May 6, 1959, Frank Palermo and Joseph Sica, defendants herein, did knowingly, willfully and feloniously obstruct, delay and affect commerce, as that term

is defined in Section 1951 of Title 18, United States Code, and did attempt to do so by extortion (as defined in the said Section of the United States Code), that is to say, the defendants Frank Palermo and Joseph Sica attempted to coerce Donald Paul Nesseth into giving up a part of his contractual right to control the professional boxing activities of welterweight champion Don Jordan by signing a match between Don Jordan and Al "Sugar" Hart contrary to the wishes and desires of Donald Paul Nesseth, through the wrongful use of force and fear.

2. Contrary to the terms and provisions of Section 1951 of Title 18, United States Code.

[fol. 9] Count Five

(U.S.C., Title 18, Sec. 371, 875(b))

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo, aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully and with intent to extort money and a thing of value, to wit, a share of the management of the prize fighter Don Jordan, from Leonard Blakely and Donald Paul Nesseth, to transmit in interstate commerce communications containing threats to injure the persons of Donald Paul Nesseth and Leonard Blakely in violation of Title 18, United States Code, Sections 371 and 875(b).

3. The objects of said conspiracy were to be accomplished as follows:

a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to victims Donald Paul Nesseth and Leonard Blakely, aka Jackie

Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth [fol. 10] and Leonard Blakely without payment of consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California and in other places, among which are the following:

a. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

b. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

c. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

d. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

e. On or about April 29, 1959, defendant Frank [fol. 11] Palermo had a telephone conversation with Leonard Blakely.

[fol. 12] Count Six

(U.S.C., Title 18, Sec. 875(b))

1. On or about January 27, 1959, defendant Frank Palermo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the person of Leonard Blakely, in violation of Title 18, United States Code, Section 875(b).

[fol. 13] Count Seven

(U.S.C., Title 18, Sec. 875(b))

1. On or about January 27, 1959, defendant Paul John Carbo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the person of Leonard Blakely, in violation of Title 18, United States Code, Section 875(b).

[fol. 14] Count Eight

(U.S.C., Title 18, Sec. 875(b))

1. On or about April 28, 1959, defendant Frank Palermo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the persons of Leonard Blakely and Donald Paul Nesseth, in violation of Title 18, United States Code, Section 875(b)).

[fol. 15] Count Nine

(U.S.C., Title 18, Sec. 875(b))

1. On or about April 28, 1959, defendant Paul John Carbo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the persons of Leonard Blakely and Donald Paul Nesseth, in violation of Title 18, United States Code, Section 875(b)).

[fol. 16] Count Ten

(U.S.C., Title 18, Sec. 875(b))

1. On or about April 29, 1959, defendant Frank Palermo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the persons of Leonard Blakely and Donald Paul Nesseth, in violation of Title 18, United States Code, Section 875(b)).

A True Bill

Axel C. Johnson, Foreman.

Laughlin E. Waters, United States Attorney.

[fol. 18]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

PROCEEDINGS ON ARRAIGNMENT AND PLEA—December 2, 1959

Minutes of the Court
Date: Dec. 2, 1959,
At: Los Angeles, Calif.

No. 27,973 Criminal

U.S.A.

PAUL JOHN CARBO (Cts 1, 3, 5, 7, 9)
aka FRANKIE CARBO (Age 55)

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: W. E. Payne; Reporter: Virginia Wright; U. S. Att'y, by Assistant U. S. Att'y General: Lloyd F. Dunn; Counsel for Defendant: no appearance

Defendant present (in custody)

Proceedings: For arraignment and plea of Defendant Carbo only.

Defendant Carbo is arraigned and states his true name is Paul John Carbo, and that he is fifty-five years of age.

Defendant states he will obtain counsel.

Court directs the U. S. Marshal to permit Defendant Carbo to use the telephone for the purpose of calling counsel.

Defendant states he has posted a $100,000. bond.

Court Orders case continued to Dec. 8, 1959, 9:30 AM, for plea of Defendant Carbo and Court states that said date may be advanced if defendant so desires.

John A. Childress, Clerk, By Wayne E. Payne, Deputy Clerk.

T-12/2/59.

[fol. 19]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

PROCEEDINGS ON ARRAIGNMENT AND PLEA—December 8, 1959

Minutes of the Court
Date: Dec. 8, 1959,
At: Los Angeles, Calif.

No. 27,973 Criminal

U.S.A.

vs.

PAUL JOHN CARBO, aka JOHN PAUL CARBO, aka FRANKIE CARBO, (Cts 1, 3, 5, 7, 9)

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: W. E. Payne; Reporter: Virginia Wright; U. S. Att'y, Laughlin E. Walters; Counsel for Defendant no appearance.

Defendant present (in custody)

Proceedings: For plea of Defendant Carbo.

Defendant appears without counsel and requests permission to enter his plea and be permitted to return to New York and obtain counsel there and return here for the trial.

Defendant Carbo pleads not guilty to counts 1, 3, 5, 7, and 9 of the Indictment.

Court Orders cause as to Defendant Carbo set for trial with co-defendants on March 29, 1960, 9:30 AM, and directs that Defendant Carbo be returned to New York for the purpose of obtaining counsel and be returned here in time for trial.

John A. Childress, Clerk, By Wayne E. Payne, Deputy Clerk.

T-12/8/59.

[fol. 20]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 27973-CD

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, et al., Defendants.

MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM—Filed March 14, 1960

The defendant, Paul John Carbo, moves the above entitled Court for an order quashing the Writ of Habeas Corpus ad Prosequendum issued herein.

The ground of said motion is that this Court has no jurisdiction, and/or has exceeded its jurisdiction in issuing said Writ.

The defendant will rely upon the files and records herein, the affidavit of William B. Beirne, filed concurrently herewith and the Points and Authorities attached hereto.

William B. Beirne, A. L. Wirin, Attorneys for Defendant Paul John Carbo.

[fol. 21]

AFFIDAVIT OF WILLIAM B. BEIRNE IN SUPPORT OF MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM

State of California)
County of Los Angeles) ss

William B. Beirne, being first duly sworn, deposes and says:

That he is the attorney of record for Paul John Carbo, one of the defendants in the above-entitled action.

That affiant is informed and believes and on such information and belief alleges that said defendant is now and for some months past has been confined in the prison ward of Bellevue Hospital in New York City, New York, as a prisoner of the State of New York following a conviction of a misdemeanor in that State; that on or about the 3d day of March, last, affiant visited said defendant in said ward and on that occasion talked with a Dr. Hummell, a physician attached to said hospital; that Dr. Hummell informed affiant that he had been attending said defendant since the latter's confinement in said hospital as a patient; that said defendant was then and for some time theretofore had been suffering from a severe kidney infection which required constant treatment; that it is necessary to give said defendant certain medication four times a day at certain definite times and that it is also necessary that defendant be given urine tests four times a day; that if the defendant were to be sent to Los Angeles for trial there it would be imperative that he be transported there in the shortest possible time, and that upon arrival in Los Angeles and during his stay there, it would be necessary that he be given the kind of medical care which he was then receiving and in a hospital equipped for that purpose; that since the defendant was a patient under the care of the Bellevue Hospital the hospital and the doctors attending said defendant had a responsibility for his health and well-being; [fol. 22] and the doctor was of the opinion that unless the defendant continued to receive the treatment that he was then receiving for the ailment from which he is suffering, his life might be endangered; that affiant has requested said doctor to prepare and forward to affiant a letter setting forth said defendant's physical condition, the treatment to be given said defendant for the ailment from which he is suffering, and the doctor's prognosis of the case; that affiant has been informed and believes, and upon said information and belief avers that said letter has been forwarded to affiant.

That on the evening of March 11th, last, affiant talked from Los Angeles over the telephone with Mrs. Carbo, the wife of the defendant, in New York City; that Mrs. Carbo informed affiant that she had talked with Dr. Hummell the

day before, and was informed by him that the defendant's temperature on the two previous nights had been as high as 105 degrees, but that during the day it had lowered.

William B. Beirne

Subscribed and sworn to before me this 14th day of March 1960, Sheila M. Schaum, Notary Public in and for said County and State.

My Comm. Exp.: 4-30-60.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

OPPOSITION TO MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM—Filed March 15, 1960

Comes Now the plaintiff United States of America in opposition to the motion of defendant Paul John Carbo to quash writ of habeas corpus ad prosequendum and respectfully represents:

This Honorable Court has jurisdiction to issue the writ of habeas corpus ad prosequendum.

Wherefore the United States of America respectfully requests the Court to deny said motion.

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General; Attorneys for Plaintiff.

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 27973 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, aka Frankie Carbo, et al., Defendants.

APPLICATION AND ORDER FOR WRIT OF HABEAS CORPUS AD PROSEQUENDUM—Filed March 16, 1960

Comes Now the United States of America by the United States Attorney, and represents and shows:

That there is now detained in New York City Prison, Bellevue Hospital, New York, New York, in the custody of the Warden, Sheriff or Jailor thereof, the defendant in the above-entitled case, which said case will be called for trial on the 29th day of March, 1960, at the hour of 10:00 a.m., and that it is necessary to have said defendant present in the courtroom of the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, and in order to secure the presence of said defendant it is necessary that a Writ of Habeas Corpus ad Prosequendum be issued commanding said Warden, Sheriff or Jailor to produce said defendant in said court on said date, and at such other dates as may be necessary in order to procure his presence for arraignment and plea and all other proceedings incident thereto.

Wherefore, your petitioner prays for an order directing the issuance of a Writ of Habeas Corpus ad Prosequendum out of and under the seal of this court, directed to said Warden, Sheriff or Jailor, commanding him to have and

produce the above-named defendant in said United States District Court at said time, and then and there to present said defendant before the court and from day to day thereafter as may be necessary; and at the termination of the proceedings against said defendant to return him to the custody of said Warden, Sheriff or Jailor.

Dated: March 15, 1960

Laughlin E. Waters, United States Attorney, By Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Plaintiff.

ORDER

Upon reading and filing the foregoing application in that behalf;

It Is Ordered that a Writ of Habeas Corpus ad Prosequendum issue as prayed for herein.

Dated: March 16, 1960

Ernest A. Tolin, United States District Judge.

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 27973-CD

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, et al., Defendants.

ORDER AND JUDGMENT DENYING MOTION TO QUASH—March 16, 1960

Defendant Paul John Carbo, having filed a Motion to Quash Writ of Habeas Corpus ad Prosequendum, and the matter having been heard on March 16, 1960 before the

undersigned, Judge of the above entitled Court, plaintiff appearing by Lloyd F. Dunn, Special Assistant to the Attorney General, defendant Paul John Carbo, appearing by William B. Beirne and A. L. Wirin, and the matter having been argued and the Court having considered the same,

It Is Hereby Ordered Adjudged and Decreed that the Motion to Quash Writ of Habeas Corpus ad Prosequendum is denied.

Dated: March 16, 1960.

Ernest A. Tolin, Judge, United States Distrct Court.

[fol. 30] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 27973-CD

[Title omitted]

NOTICE OF APPEAL—Filed March 16, 1960

Name and address of appellant: Paul John Carbo, in custody, Bellevue Hospital, New York City, New York.

Names and addresses of appellant's attorneys: William B. Beirne, 408 South Spring Street, Los Angeles 13, California and A. L. Wirin, 257 South Spring Street, Los Angeles 12, California.

Offense: 18 USC 371, 875(b), 1951.

Concise statement of Judgment: Order denying Motion to Quash Writ of Habeas Corpus ad Prosequendum dated March 16, 1960.

Name of institution where now confined: Bellevue Hospital, New York City, New York.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment and order.

Dated: March 16, 1960.

William B. Beirne, A. L. Wirin, Appellant's Attorneys.

[fol. 32] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 27973-CD

[Title omitted]

STIPULATION RE RECORD ON APPEAL FROM ORDER DENYING MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM IN RE DEFENDANT PAUL JOHN CARBO—Filed March 16, 1960

It Is Hereby Stipulated between the attorneys for the plaintiff and defendant Paul John Carbo in the above entitled action that the following be the record on appeal from the Order Denying Motion to Quash Writ of Habeas Corpus ad Prosequendum and the Clerk is requested to prepare same:

1. Indictment;

2. Arraignment and plea of defendant Paul John Carbo dated December 2 and 8, 1959, respectively;

3. Application for Writ of Habeas Corpus ad Prosequendum and Order dated March 16, 1960;

4. Defendant Carbo's Motion to Quash Writ of Habeas Corpus ad Prosequendum and Plaintiff's Opposition thereto;

5. Order Denying Motion to Quash Writ of Habeas Corpus ad Prosequendum;

6. Notice of Appeal;

[fol. 33] 7. This Stipulation and Designation.

Dated: March 16, 1960.

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General; By Charles G. Lynberg, A.U.S.A., Attorneys for Plaintiff.

William B. Beirne, A. L. Wirin, Attorneys for Defendant Paul John Carbo.

[fol. 33a] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

16820

No. 27973 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, aka Frankie Carbo, et al., Defendants.

WRIT OF HABEAS CORPUS AD PROSEQUENDUM—
March 16, 1960

The President of the United States of America

To: The Warden, Sheriff or Jailor of New York City Prison, Bellevue Hospital, New York, New York.

Greeting

We Command that you produce and deliver the body of Paul John Carbo aka Frankie Carbo now in your custody before the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, on March 29, 1960, at the hour of 10:00 a.m., in order that said defendant in the above-entitled case may then and there be tried at said time and place, and also at such other times as may be ordered by the said court, and have you then and there this writ.

The delivery of the body of said Paul John Carbo aka Frankie Carbo to the Courtroom of said United States District Court, as aforesaid, and the return by you of said defendant to your custody shall be deemed sufficient compliance with the writ.

Witness the Honorable Ernest A. Tolin, Judge of the United States District Court for the Southern District of California.

Dated: March 16, 1960

Clerk, United States District Court, Southern District of California, By W. A. White, Deputy Clerk.

[fol. 35]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Honorable Ernest A. Tolin, Judge Presiding

No. 27,973-Crim.

UNITED STATES OF AMERICA, Plaintiff,

vs.

PAUL JOHN CARBO, et al., Defendants.

Reporter's Partial Transcript of Proceedings—March 16, 1960

APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney, Lloyd F. Dunn, Special Assistant to Attorney Gen'l, 762 Federal Building, Los Angeles, California.

For the Defendant, Paul John Carbo: William B. Beirne, 408 South Spring Street, and A. L. Wirin, 257 South Spring Street, Los Angeles, California.

[fol. 36] Los Angeles, California,

Wednesday, March 16, 1960. 2:00 P.M.

* * * * * * *

The Court: The motion is denied. In peremptorily denying it I do not mean that it isn't worthy of discussion. I think this is a question which should go to the Court of Appeals. It is perhaps a question upon which the Supreme Court should be given an opportunity to adjudicate.

By raising the question now, at this time, you are going to get it to that court probably before it is moot; that is, having in mind the possibilities in the lawsuit. It might become moot by dismissal or an acquittal or something of

that kind. But, in any event, you should undertake proceedings such as you have done in this case at about this time.

I think your record to the Court of Appeals is better if you don't have a stay, but if you want one you may have it. Also regardless of stay, just as a matter of courtesy, you are all gentlemen who get along well together. Mr. Dunn and the Marshal will cooperate and do whatever is practical I am sure.

The clerk will enter the order of denial immediately so you can get your appeal under way.

Mr. Wirin: Your Honor is quite correct. And may I observe that counsel on both sides apparently have gotten [fol. 37] along very well and therefore we are content to leave the matter as it is.

The Court: Thank you.

Mr. Wirin: We have a form of Order, your Honor, which we will hand to the clerk and copies to the other side, so that there may be a written order in the file. Then we will repair to the Clerk's office and see what influence we have with the clerk to get—

The Court: You anticipated my ruling.

Mr. Wirin: Well, we knew about the DeSimone ruling.

The Court: You didn't prepare two orders, one each way, did you?

Hand it up and I will sign it immediately so you can get on your way.

Mr. Wirin: Thank you. Mr. Dunn says it is agreeable as to form.

The Court: I have signed it and if you take it in to the Clerk's office they will process it for you immediately.

Mr. Wirin: Thank you.

Mr. Beirne: Thank you very much.

(Whereupon, at 2:40 o'clock p.m. Wednesday, March 16, 1960, an adjournment was taken.)

[fol. 38] Reporter's Certificate (omitted in printing).

[fol. 40]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Stephens, Pope and Hamlin, Circuit Judges.

ORDER OF SUBMISSION—March 22, 1960

Ordered (1) Motion of Appellee to dismiss the appeal herein, (2) Motion of Appellant for Stay of Proceedings, (3) Motion of Appellant for leave to file Petition for Writ of Mandamus, and (4) cause on merits, presented by Mr. Lloyd F. Dunn, Special Assistant to the Attorney General, counsel for the Appellee, and by Mr. A. L. Wirin, counsel for the Appellant, and submitted to the Court for consideration and decision.

Pursuant to stipulation of counsel for respective parties, It Is Further Ordered that the Writ of Habeas Corpus ad Prosequendum, dated March 16, 1960, be filed and be made a part of the record before this Court.

[fol. 41]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Stephens, Pope and Hamlin, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 23, 1960

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 42] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted]

ORDER RE SUBMISSION—March 23, 1960

This cause came on to be heard this day upon the motion of the United States to dismiss the appeal, and was argued by counsel. Upon conclusion of the argument, it was stipulated by counsel for both sides that the appeal itself might be deemed submitted to the court for decision upon the merits, upon the record as filed, and the briefs and memoranda of the parties now on file with the court, and without further briefs or argument.

The court having considered the matter further, it is ordered that the cause be and it is hereby ordered submitted, (1) upon the motion to dismiss the appeal, and (2) upon the merits of the appeal itself.

Albert Lee Stephens, Walter L. Pope, Oliver D. Hamlin, Circuit Judges.

[fol. 43]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16,820

PAUL JOHN CARBO, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division

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PER CURIAM OPINION—March 23, 1960

Before: Stephens, Pope and Hamlin, Circuit Judges.

Per Curiam:

A 10-count indictment was returned by the Grand Jury in the Southern District of California, Central Division, on September 22, 1959, charging Paul John Carbo, aka Frankie Carbo, hereinafter appellant, and four others with violations of 18 U.S.C.A. §§ 1951, 875(b) and 371. Appellant posted bond at Baltimore, Maryland, returnable to the United States District Court at Los Angeles in the sum of $100,000.00. Thereafter, but prior to his appearance in Los Angeles upon the charges contained in the indictment filed there, appellant was charged with and pleaded guilty to three misdemeanor counts in New York City, New York, and was sentenced to two years in prison and fined. During appellant's New York confinement in prison, the New York authorities honored a writ of habeas corpus ad prosequendum issued by the District Court for the Southern District of California and permitted appellant to appear in said court at Los Angeles to answer to the charges in the indictment. On December 2, 1959, when he appeared in said Court, he was arraigned on the charges contained in

the indictment, and stated that he had posted a $100,000.00 bond. On December 8, in said District Court, the defendant [fol. 44] requested permission to enter his plea and be permitted to return to New York and later return to Los Angeles for trial. Appellant entered a plea of not guilty to counts 1, 3, 5, 7 and 9 of the indictment, and the Court then set the case against all defendants for trial on March 29, 1960, and at appellant's request directed that he be returned to New York for the purpose of obtaining counsel and be returned to the Southern District of California in time for trial.

On March 16, 1960, after application by the United States Attorney, the District Judge in said district directed the issuance of a document entitled "Habeas Corpus Ad Prosequendum" directed to the jailer of New York City Prison, Bellevue Hospital, New York City, New York, commanding him to produce the appellant in the District Court for his trial upon March 29, 1960. Appellant filed in said District Court a motion to quash said writ and the United States Attorney filed an opposition to such motion. After hearing, the District Court denied appellant's motion to quash.

Appellant thereupon appealed to this Court from said order of denial.

On March 22, 1960, after a motion to dismiss said appeal had been filed by the United States Attorney, counsel for the appellant and the United States filed memoranda of authorities and orally argued the matter before this Court. It was stipulated by counsel for appellant and for the United States that the appeal itself might be deemed submitted to this Court for decision upon the merits, upon the record as filed and the briefs and memoranda of the parties on file with the Court, and without further briefs or argument, and this Court so ordered.

Appellant contends that the District Court had no jurisdiction to issue the writ in question, because the appellant is in custody in New York out of the territorial jurisdiction of the District Court.

Appellant relies upon *Ahrens* v. *Clark*, 335 U.S. 188, decided June 21, 1948. In that case, the petitioners were confined in New York and the petitions for habeas corpus alleging the illegal restraint of their liberty in New York

were filed in the District Court of the District of Columbia. [fol. 45]. The statute there under consideration by the Court then provided (28 U.S.C. 452):

> "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus *for the purpose of an inquiry into the cause of restraint of liberty.* A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had." (Emphasis ours)[1]

The Court stated at page 190:

> "The question at the threshold of the case is whether the words 'within their respective jurisdictions' limit the district courts to inquiries into the *causes of restraints of liberty* of those confined or restrained within the territorial jurisdictions of those courts." (Emphasis ours)

In the instant case there is no question before the Court of any illegal restraint of liberty. The appellant does not complain that he is illegally restrained by any authority. His only objection is his contention that the United States District Court cannot by its order arrange to have him brought from New York to Los Angeles for trial upon charges contained in an indictment on file in the District Court there. The *Ahrens* case is not in point.

There is a distinction between the writ of habeas corpus ad subjiciendum which was under consideration in the *Ahrens* case and the writ of habeas corpus ad prosequen-

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[1] The successor to this section is 28 U.S.C. 2241. The reviser's notes to this section state:

> "Words 'for the purpose of an inquiry into the cause of restraint of liberty' in section 452 of Title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ."

dum which is under consideration in this case. *Price* v. *Johnston*, 334 U.S. 266, at 281.[2]

[fol. 46] The purpose of the writ of habeas corpus ad subjiciendum (sometimes called The Great Writ) is to inquire as to the legality of the prisoner's restraint. It was this writ that the Supreme Court was discussing in *Ahrens*.

The writ of habeas corpus ad prosequendum has an entirely different purpose. The legality of the prisoner's restraint is not in question. It is issued "when it is necessary to remove a prisoner . . . in order to . . . be tried in the proper jurisdiction wherein the fact was committed." *Price* v. *Johnston, supra*. That this should be done is indicated by the language of the Supreme Court in *Ponzi* v. *Fessenden*, 258 U.S. at 264, where it is said:

> "The authorities, except when special statutes make an exception are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. . . . Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offense is to postpone trial on many others it furnishes the criminal an opportunity to avoid the full expiation of his crimes."

Respondent contends that the District Court had power to issue the writ in question under 28 U.S.C.A. § 1651(a), which reads as follows:

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[2] Black's Law Dictionary, 4th Ed. 1957, contains the following at page 837:

HABEAS CORPUS. Lat. (You have the body.) The name given to a variety of writs, (of which these were anciently the emphatic words,) having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are understood to mean the *habeas corpus ad subjiciendum*, (see infra). Dancy v. Owens, 126 Okl. 37, 258 P. 879, 884; In re McDevitt, 101 Misc. 588, 168 N.Y.S. 433; U.S. v. Tod, 263 U.S. 149, 44 S.Ct. 54, 57, 68 L.Ed. 221; Payne v. Graham, 20 Ala.App. 439, 102 So. 729, 731.

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The District Court had jurisdiction of the offense charged against the defendant-appellant and of the appellant him- [fol. 47] self. After his arrest he had given a bond conditioned upon his appearance in the District Court at appropriate times; he had appeared in the District Court in answer to the charge against him; had entered a plea of not guilty; and had consented to a trial date being set. At his request, he was permitted to return to New York pending his trial.

Under § 1651 the District Court had the power to issue all writs necessary or appropriate in aid of its jurisdiction. As illustrative of the fact that the power of the District Court may extend beyond its territorial limits, attention may be called to two rules of the Federal Rules of Criminal Procedure, which have the force of law.

Under Rule 4 of the F.R.C.P., providing for warrants of arrest, subdivision (c)(2) provides: "The warrant may be executed . . . at any place within the jurisdiction of the United States."

Under Rule 17 F.R.C.P., providing for the attendance of witnesses, subdivision (e)(1) provides: "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States." These rules make it plain that the jurisdiction of a District Court for certain purposes is not limited to the territorial jurisdiction of that Court.

In *United States* v. *Hayman*, 342 U.S. 205, the Supreme Court had occasion to consider the power of a District Court in a section 2255 proceeding. In holding there that the District Court had the power to order the presence of a prisoner who was confined in another district, the Supreme Court said:

> "The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other

necessary witnesses to the district of confinement. The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law."

[fol. 48] We believe that in this case the District Court is not impotent to bring before it for trial a defendant who has been indicted by that Court, who has entered a plea of not guilty in that Court, and who at his request has gone to the State of New York, and whose presence is now required in the Southern District of California for the purpose of proceeding with the prosecution against him.

We hold that the writ issued in this case by the District Court was proper under 28 U.S.C.A. § 1651(a) as being necessary and appropriate in aid of its jurisdiction.

Judgment affirmed.

Appellant has also presented a motion for leave to file a petition for a writ of mandamus directed to the District Court to quash the issued writ and a motion to stay enforcement of the issued writ. Each of said motions is denied.

[fol. 49] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16,820

PAUL JOHN CARBO, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—March 23, 1960

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motion of Appellee to dismiss appeal, and motion of Appellant for stay of proceedings, and petition of Appellant for leave to file petition for writ of mandamus, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, that the motion for stay of proceedings, be, and hereby is denied, and that the motion for leave to file petition for writ of mandamus, be, and hereby is denied.

[fol. 50] Clerk's Certificate (omitted in printing).

[fol. 51]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

NOTICE OF MOTION TO DISMISS APPEAL—Filed March 18, 1960

To: Paul John Carbo and his attorneys:

Please Take Notice that on March 22, 1960, at 9:30 A.M., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the appellee will move said court for an order dismissing the appeal and for such other relief as may be appropriate.

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Appellee, United States of America.

[fol. 52]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION TO DISMISS APPEAL—Filed March 18, 1960

Appellee, the United States of America, respectfully moves this court for an order dismissing the appeal on the grounds that (1) the order denying the motion to quash

writ of habeas corpus ad prosequendum is interlocutory and nonappealable at this time, (2) the appellant has no standing to object to the issuance of the writ of habeas corpus ad prosequendum, it being solely a matter between two sovereign powers, the United States of America and the State of New York, and (3) the appeal is frivolous and taken solely for the purpose of delay. This motion is made pursuant to Rules 73 and 75(j) of the Federal Rules of Civil Procedure, Title 28, United States Code.

Statement of Facts

On September 22, 1959, a Federal grand jury for the Southern District of California returned an indictment charging appellant Paul John Carbo and four others with [fol. 53] conspiracy and other violations of Federal criminal law. Appellant posted bond at Baltimore, Maryland, returnable to the Federal District Court at Los Angeles. Before his appearance in Los Angeles, however, appellant came into the custody of officers of the City of New York on other pending charges. Appellant plead guilty to three misdemeanor counts in New York City, New York, and was sentenced to two years in prison and fined. Meanwhile the other defendants had all appeared and entered not guilty pleas to the Federal charges, and a trial date was set. After appellant's New York sentence, the New York authorities honored a writ of habeas corpus ad prosequendum permitting appellant to appear in the Federal District Court at Los Angeles. He was arraigned on December 2, 1959, and plead not guilty on December 8. Thereafter, because of appellant's physical ailments and at his request, the Federal District Court caused appellant to be returned to New York, discharging the writ of habeas corpus ad prosequendum. Appellant has since remained in a prison hospital in New York City.

On March 16, 1960, the Federal District Court for the Southern District of California issued a new writ of habeas corpus ad prosequendum directing that appellant be brought to Los Angeles for trial on the Federal indictment to commence March 29, 1960. This date had previously been set by the Court and agreed to by the defendant. Ap-

pellant immediately filed a motion to quash the writ on the [fol. 54] ground that the Court had no jurisdiction to issue such process beyond the boundaries of the District. The Government is an [sic] opposition to the motion to quash. The motion was heard and denied on March 16, 1960. Appellant, on the same day, filed notice of appeal of the order denying his motion.

Object of This Motion

This motion is brought for the purpose of obtaining an expeditious dismissal of this appeal, which is improper in that the order denying appellant's motion to quash is an interlocutory order in a criminal proceeding, and for the further reason that appellant as a prisoner of the New York authorities has no standing to question the issuance of this writ, and for the additional reason that the appeal is patently frivolous and brought solely for the purpose of delaying the trial which is now set for March 29, 1960.

This motion is accompanied by a memorandum of points and authorities and affidavit, and is based on all these documents together with the Clerk's transcript of record.

Wherefore, the United States of America respectfully requests this honorable court to dismiss the appeal and for prompt issuance of its mandate in order that the scheduled trial may not be delayed.

Respectfully submitted,

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Appellee, United States of America.

[fol. 55]

AFFIDAVIT OF LLOYD F. DUNN

Lloyd F. Dunn, being first duly sworn deposes and says:

That he is an attorney-at-law, admitted to practice in the State of California and in this Honorable Court; that he is a Special Assistant to the Attorney General of the United States stationed at Los Angeles, California.

On September 22, 1959, a Federal grand jury for the Southern District of California returned an indictment charging appellant Paul John Carbo and four others with conspiracy and other violations of Federal law. Appellant was arrested in Baltimore, Maryland, where he posted bond returnable to Los Angeles, California. Prior to his appearance in Los Angeles, appellant came into custody of officials of the City of New York, State of New York, on criminal charges. Thereafter appellant plead guilty to three misdemeanor counts and was sentenced to imprisonment and a fine. After completion of the proceedings in New York and [fol. 56] during his confinement by the authorities of that State, appellant was produced in the Federal District Court at Los Angeles under a writ of habeas corpus ad prosequendum. He was arraigned on the Federal charges on December 2, 1959, and plead not guilty on December 8. The District Court at Los Angeles fixed March 29, 1960, as the date for trial. Upon appellant's request and due to his physical condition, appellant was returned to the City of New York where he has been held in a prison hospital.

On March 16, 1960, a Federal District Court at Los Angeles issued a second writ of habeas corpus ad prosequendum to return the appellant to Los Angeles for trial. Appellant filed a motion to quash this writ on the ground that the Court did not have power to issue such process beyond its territorial jurisdiction. An opposition was filed on behalf of the Government. The motion was heard and denied on March 16, 1960. Appellant filed an immediate notice of appeal.

It is the Government's position (1) that the habeas corpus was process issued in aid of the Court's criminal jurisdiction, and that as such the order denying the motion to quash

is an interlocutory order and not appealable until after the conclusion of the matter, (2) that the appellant has no standing to challenge the writ of habeas corpus ad prosequendum which is wholly a matter between two political sovereigns, the United States of America and the State of [fol. 57] New York, and (3) that the motion to quash and the appeal from its denial at this time are frivolous actions of appellant taken only for the purpose of delay inasmuch as trial has been set for a period of several months for March 29, 1960.

Respectfully submitted,

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Appellee, United States of America.

Subscribed and Sworn to before me this 17th day of March, 1960.

John A. Childress, Clerk, U. S. District Court, Southern District of California, By Wm. A. White, Deputy.

[fol. 58]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16820

[Title omitted]

NOTICE OF MOTION FOR STAY PENDING APPEAL

To: United States of America, appellee, and Lloyd F. Dunn, one of its counsel:

Please Take Notice that on March 22, 1960, at 9:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth

Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the appellant will move said Court for an Order staying the enforcement, pending appeal, of the Writ of Habeas Corpus Ad Prosequendum issued by the United States District Court below.

The appellant will rely upon the files and records on appeal herein, upon the Memorandum of Points and Authorities in opposition to the Appellee's Motion to Dismiss and upon the Affidavit of William B. Beirne filed herein.

William B. Beirne, A. L. Wirin, Attorneys for Appellant.

[fol. 59]

AFFIDAVIT OF WILLIAM B. BEIRNE

State of California)
County of Los Angeles) ss.

William B. Beirne, being first duly sworn, deposes and says that:

He is one of the attorneys for the appellant herein; the affiant has received a letter from J. A. Hummel, M.D. of Bellevue Hospital in New York, a photocopy of which is annexed hereto and incorporated herein.

William B. Beirne

Subscribed and sworn to before me this 18th day of March 1960. Sheila M. Schaum, Notary Public in and for said County and State. My Commission Expires: 4-30-60.

[fol. 60]

ATTACHMENT TO AFFIDAVIT

NEW YORK UNIVERSITY-BELLEVUE MEDICAL CENTER
NEW YORK UNIVERSITY POST-GRADUATE MEDICAL SCHOOL
550 FIRST AVENUE, NEW YORK 16, N. Y.
DEPARTMENT OF UROLOGY OREGON 9-3200

March 11, 1960

TO WHOM IT MAY CONCERN:

Mr. Paul Carbo has been a patient of Fourth Division Urology on Ward I-1 in Bellevue Hospital since January 26, 1960.

His admitting diagnosis was hematuria secondary to Uric Acid renal stones. He had been treated previously, September 1959 in Johns Hopkins Hospital, Baltimore for the same condition.

Intravenous Pyelogram on January 26, 1960 revealed right calyectasis with delayed emptying of dye and a partial occlusion of the (R) ureter, secondary to a non-radio-opaque obstruction.

Retrograde pyelogam of January 29, 1960 revealed partial occlusion of the uretero-pelvic junction of the right renal collecting system possibly due to Uric acid fragments.

The patient's pertinent past medical history includes:

1. Myocardial infact—1948 He is on no cardiac drugs at present.
2. Gout—(R) hallux 1950.
3. Diabetes Mellitus. Diagnosed approximately one year prior to this hospital admission. Now controlled on diet alone.

The patient's course on this admission has been relatively benign except for two occasions on which he ran a fever in the range of 102-105° for approximately 5 days each time. The first episode occurred following retrograde pyelography and subsides with therapy. The second oc-

curred while the patient was on therapy and despite therapy. (March 4 thru March 9). This break-through of the disease despite therapy now raised the question of the possible necessity of surgical intervention to alleviate his renal problem.

Until we can be sure that this will not be necessary, or that the trip to California will not adversely affect Mr. [fol. 61] Carbo's prognosis, we would prefer to keep him here under observation.

At present his therapy consists of:

1. Furadantin and Chloromycetin to combat urinary tract infection.
2. Polycitia to alkalinize the urine and prevent the formation and aid the dissolution of uric acid stones.
3. Antipyritic therapy as needed.

We will be happy to arrange for his transfer to the west coast at the earliest possible moment.

We strongly urge that, on arrival in California, Mr. Carbo be placed in a medical facility where he can receive careful observation and attention for his nephrolithiasis. Neglecting this condition could result in serious consequences.

Respectfully,

/s/ J. A. Hummel, M.D.

J. A. Hummel, M.D.
Fourth Division Urology
Bellevue Hospital
New York, New York

JAH:erb

[fol. 62] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, Petitioner,

v.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, Respondent.

NOTICE OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS—Filed March 21, 1960

To the Respondent and Lloyd F. Dunn, its attorney:

Please Take Notice that on March 22, 1960, at 9:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the petitioner will move said Court for leave to file the Petition for Writ of Mandamus submitted herewith.

The petitioner will rely upon the Memorandum of Points and Authorities filed in *Carbo* v. *United States*, No. 16820.

William B. Beirne, A. L. Wirin, Attorneys for Petitioner.

[fol. 63]

PETITION FOR WRIT OF MANDAMUS

I

The petitioner is presently at the Bellevue Hospital in New York and is the appellant in *Carbo* v. *United States of America*, No. 16820 in this Court.

II

The respondent is the United States District Court for the Southern District of California.

III

On March 16, 1960 the respondent court issued a writ of Habeas Corpus ad Prosequendum as to the petitioner; and denied the petitioner's Motion to Quash said Writ.

Said Court had no jurisdiction and/or exceeded its jurisdiction in entering both such orders.

IV

The petitioner incorporates herein by reference the allegations made as appear in the files and records of said [fol. 64] appeal currently pending before this Court aforesaid, *Carbo* v. *United States of America*, No. 16820.

V

The appellee in said above entitled appeal contends that the orders of said District Court aforesaid are interlocutory orders and not subject to review.

VI

In the event this Court determines that said orders are not appealable and not subject to review, the petitioner will suffer irreparable injury, as set forth more particularly in the files and records in said *Carbo* v. *United States*, this Court, No. 16820, aforesaid:

Wherefore, the petitioner prays that this Court issue its Writ directing the respondent court to vacate the Writ

of Habeas Corpus ad Prosequendum aforesaid; and to vacate its order denying the petitioner's Motion to Quash said Writ aforesaid; for appropriate relief pendente lite before this Court; and for such other relief to which the petitioner may be entitled in the premises.

William B. Beirne, A. L. Wirin, Attorneys for Petitioner.

[fol. 65] VERIFICATION (omitted in printing).

[fol. 66]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

NOTICE OF MOTION FOR STAY

To the Respondent and Lloyd F. Dunn, its attorney:

Please Take Notice that on March 22, 1960, at 9:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the petitioner will move said Court for an Order staying the enforcement, pending determination of the within proceedings, of the Writ of Habeas Corpus Ad Prosequendum issued by the United States District Court below.

The petitioner will rely upon the files and records of this Court in the instant matter; the Memorandum of Points and Authorities filed herein; and the Memorandum of Points and Authorities filed in *Carbo* v. *United States*, No. 16820.

William B. Beirne, A. L. Wirin, Attorneys for Petitioner.

[fol. 67]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR STAY—Filed March 25, 1960

WESTERN UNION

(Stamp—Filed, Mar. 25 1960, Frank H. Schmid, Clerk.)

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UNITED STATES COURT OF APPEALS,
ATTN. JUDGE ALBERT LEE STEPHENS,
UNITED STATES POSTOFFICE AND COURTHOUSE,
SFRAN.

INTEND FILE IMMEDIATELY PETITION FOR WRIT OF CERTIORARI UNITED STATES SUPRI ME COURT, CARBO V. UNITED STATES, NO. 16820. PLEASE CONSIDER THIS TELEGRAM AS APPLICATION FOR STAY OF ENFORCEMENT OF WRIT OF HABEAS CORPUS AD PROSEQUENDUM ISSUED BY UNITED STATES DISTRICT COURT PENDING PETITION FOR WRIT OF CERTIORARI.

WILLIAM B. BEIRNE AND A. L. WIRIN ATTORNEYS FOR APPELLANT CARBO

[fol. 68]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

ORDER DENYING MOTION FOR STAY AND DIRECTING IMMEDIATE ISSUANCE OF MANDATE—March 25, 1960

Before: Stephens, Pope and Hamlin, Circuit Judges.

The telegram petition for stay of enforcement of writ of habeas corpus ad prosequendum heretofore issued in the proceeding of Carbo vs. United States of America, No. 16820, pending petition for the writ of certiorari to the United States Supreme Court is denied, and it is ordered that our mandate issue immediately.

Albert Lee Stephens, Walter L. Pope, Oliver D. Hamlin, Circuit Judges.

Endorsed.

Filed March 25, 1960, Frank H. Schmid, Clerk.

[fol. 69] Clerk's Certificate (omitted in printing).

[fol. 70]

SUPREME COURT OF THE UNITED STATES

No. 875, October Term, 1959

PAUL JOHN CARBO, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 31, 1960

The petition herein for a writ of certorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.